

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
(COMMERCIAL DIVISION)**

5   **MISC. APPLICATION NO. 204 OF 2015  
(ARISING FROM CIVIL SUIT NO. 174 OF 2015)**

**SUZAN NALWANGA ..... APPLICANT/PLAINTIFF  
(Suing through her lawful Attorney James Kigozi)**

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**VERSUS**

- 1. HENRY SSENOGA**
- 2. IMMACULATE SSENOGA**
- 3. BEGUMISA GEORGE**

15   **4. UGANDA DEVELOPMENT BANK LTD ..... RESPONDENTS**

**BEFORE: LADY JUSTICE FLAVIA SENOGA ANGLIN**

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**RULING**

25   This is an application for a Temporary Injunction made under S.98 C.P.A 0.41 r1, and 0.52 rr 1, 2  
and 3 C.P.R, seeking for orders that the Respondents and or their agents be restrained from  
disposing off, transacting in any way or dealing with the property comprised in LRV 3209, Folio  
15, Plot 31 Buddu Street, Masaka and the main suit pending before court is heard and disposed of.

Costs of Application were also applied for.

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The application is supported by the affidavit of James Kigozi.

There is an opposing affidavit deponed by Dorothy Ochola, the Company Secretary of the Fourth Respondent.

Both Counsel made oral submissions.

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The issue for Court to determine is whether this is a proper case for issue of a Temporary Injunction.

Counsel for the Applicant submitted that the principles for grant of an injunction were set down in  
10 the case of **Robert Kavuma vs. Hotel International SCCA 08/90** and these are the following:-

- i) Court exercises its discretion to preserve the status quo until the questions to be investigated can be disposed of.
- 15 ii) The applicant must show a prima facie case with a probability of success.
- iii) The applicant will suffer irreparable injury which cannot be adequately compensated by an award of damages.
- 20 iv) If in doubt, court will decide on the balance of convenience.

Applying the principles in the above case to the present application, Counsel for the Applicant referred to paragraph 5 and 6 of the supporting affidavit and stated that there is a prima facie case with a probability of success and there are serious bonafide triable issues.

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The case of **Kiyimba Kaggwa vs. Katende Haji Abdu Nasser HCB [1985] 44** was also relied upon for the holding *that “it is not part of the courts function at this stage to try and resolve the evidence ..... These matters can only be ultimately dealt with at the trial”*. Odoki J as he then was.

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In respect of irreparable damage, Counsel argued that the subject matter is land located in a prime location and its loss would not be adequately compensated for by an award of damages.

Further that, the balance of convenience demands that the application be allowed as it is the  
5 Applicant who is in possession.

It was then prayed that the application be granted in the interests of justice to allow the main suit to be heard on merit.

The application was opposed by Counsel for the Respondent relying on the affidavit of Dorothy  
10 Ochola dated 19.06.15.

She contended that some of the submissions of Counsel for the Applicant are based on evidence from the bar and are not indicated in the Applicant's supporting affidavit.

15 It was emphasized that the Applicant is out of jurisdiction and is represented by an Attorney. For example the land being in a prime location is not indicated in the affidavit.

However, Counsel agreed that principles for grant of injunctions have been laid down in a number of cases, some of which had been cited by Counsel for the Applicant.

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Court was urged to look at the case of **Hon. Harifa Kawooya vs. Attorney General and National Council for Higher Education C.M.A 46/2010 arising from C.M.A 42/2010**. Where Lady Justice **Stella Arach Amoko** re affirmed that there ought to be triable issues, the suit should not be frivolous and vexatious, the Applicant will suffer irreparable damage unless  
25 injunction issues.

But that the Lady Justice clearly smiled that ***“an injunction is an equitable remedy which cannot be granted to a party that has demonstrated that he/she is undeserving of the remedy”***.

30 Further that prima facie case and irreparable damage must both be established and are not alternatives.

Counsel insisted that the Applicant ought to satisfy those two grounds in her affidavit.

Commenting on triable issues, Counsel argued that the Applicant was not a party to the mortgage transaction, although the Fourth Respondent says that the Applicant participated – paragraphs 3, 4 and 5 of the affidavit in reply.

Accordingly Counsel agreed that there are triable issues but insisted that no irreparable damage had been demonstrated.

Counsel stated that the interests of both parties must be balanced. That where the likely injury is compensatable by way of damages, even where there are triable issues an injunction will not issue.

Also that, the Applicant is expected to make undertaking to be in position to compensate the Respondent if the Respondent is successful at the end of the trial: - The case of **American Cyanamid Co. vs. Eskom Ltd [1975] IAU ER 504** – Lord Diplock was cited in support.

The case of **Kayanja vs. Diamond Trust Bank (U) Ltd. HC Miscellenous Application 300 of 2008 Justice Lameck Mukasa** was relied upon for the holding that *“where the nature of loss to be suffered is not shown but merely stated, court could not speculate on such a fact.”*

Counsel then pointed out that the supporting affidavit does not indicate how the Applicant will suffer irreparable damage not atonable for by award of damages.

On the other hand, Counsel contended that the Fourth Respondent indicated that huge sums of money were lent to the borrower against the Applicant’s security – paragraphs 3, 4 and 5 affidavit in reply. The breach occurred in 2008, and no efforts were made by the borrower to redeem property despite opportunities given to them – paragraph 7 and 10.

The bank has suffered since then to date – paragraphs 12 yet it is a credible bank with capacity to compensate Applicant if her claim is successful. And that the Fourth Respondent will suffer more and yet the Applicant does not indicate capability to compensate them if she loses suit.

5 Adding that general damages compensate parties for loss for actions of the Defendant. It was submitted that “were the Applicant can be compensated and therefore the loss is not irreparable”- as per the case of **Victor Construction Works Ltd. vs. Uganda National Roads Authority** **Miscellaneous Application 601/10 HCCS 377/10** - where Lady Justice Helen Obura dismissed the application for injunction on the ground that the Applicant would be adequately  
10 compensated.

That application is also against First and Second Respondent who do not contest the execution of the mortgage. They gave their consent and therefore Applicant cannot say her interest alone would not be compensatable.

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Counsel insisted that, once mortgaged property becomes commercial and value can be ascertained then compensation can be done.

It was also pointed out that according to Annexure E1<sub>1</sub> imminent threats to dispose of property  
20 were issued in 2008, and the power of Attorney was issued the same year and yet the Applicant has not been vigilant and is therefore not entitled to an equitable remedy. The application is only intended to delay and frustrate the Fourth Respondent in conjunction with the First and Third Respondents. It was prayed that the application be dismissed with costs.

25 In rejoinder, Counsel for the Applicant submitted that the arguments raised are in the supporting affidavit.

The argument that court cannot del\_\_\_\_ in evidence at this stage was reiterated.

30 The Applicant’s consent was not sought before property was mortgaged. And that property is in a prime location is indicated by its description indicated on the title deed. It is in Masaka Town.

Emphasizing that the claim is not frivolous as there is an allegation of fraud. Counsel maintained earlier prayers.

5 **Whether this is a proper case for grant of an injunction.**

Under 0.41 r 1(a) C.P.R where it is proved to court that ***“in a suit that the property in dispute is in damage of being wasted, damaged or alienated by any party to the suit, the court may grant the injunction to such act as court thinks fit until disposal of the suit.”***

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In the present case, there is a suit pending between the parties, where the Applicant contends that the Fourth Defendants entry as a mortgage on the property was erroneous and illegally procured; cancellation of the entry is sought, plus general damages and costs of the suit. The Applicant also contends that as joint owners of the property, she was never party to the transaction and  
15 there was therefore fraud committed.

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Though the Fourth Respondent disputes the allegations of the Applicant in these respects – paragraphs 3, 4 and 5 of the affidavit in reply and paragraphs 6 of the written statement of defence; as already pointed out herein the court cannot go into evidence regarding these issues at  
this stage.

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What is apparent from the submissions of both Counsel is that the suit raises a prima facie case with a probability of success as it raises serious triable issues of fraud and illegality that merit judicial consideration indeed Counsel for the Respondent conceded in her submissions that the  
suit raises triable issues.

It is also the contention of the Applicant that she will suffer irreparable damage unless the injunction is granted as the land is located in a prime location.

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Irreparable damage has been defined as ***“loss that cannot be compensated for with money”*** – See **City Council of Kampala vs. Donozio Musisi Sekyaya C.A CA 03/2000** or to mean

***“damages that cannot easily be ascertained because there is no fixed pecuniary standard of measurement” – Blacks Law Dictionary, 9<sup>th</sup> Edition page 447.***

Counsel for the Respondent, as already indicated argues that there is nothing in the supporting affidavit to indicate whet irreparable loss the Applicant would suffer or that the property is in a prime location. And that general damages would be adequate compensation for any loss if any suffered by the Applicant. That the Fourth Respondent is in a position to pay general damages as the property is of commercial nature and the value can be ascertained.

The Applicant is also registered with the First and Second Respondents who do not contest the execution of the mortgaged the consented to.

And that it is the Fourth Respondent that will continue to suffer tremendous financial loss and inconvenience.

Decided cases have established that ***“injunctions are not obtainable to restrain atonable wrongs for which damages are a proper remedy. And are only available where compensatory damages would be inadequate”*** – See **London and Black Wall Railway Co. Ltd. vs. Cross (1986) 31 CH D 35 at 369 and American Cyanamid Co. vs. \_\_\_ Ltd (Supra)** that court is aware that Equity only steps in to do justice where Cannon Law has provided no remedy. And compensatory damages would be inadequate if no damages are available at Cannon Law for the infringement of the particular wrong, if the damages would be nominal or small, if the loss would compensate only for past loss and not for loss that might arise in the future. And that damages would also be inadequate remedy if the Defendant was unable to afford to pay then. – **Principles of Equity and Trusts by Graham Virgo page 716 paragraph 3.**

In the present case, while the Applicant does not indicate what kind of irreparable damage she will suffer, there is no doubt that the property is located in a prime location – Masaka Town. This is apparent from its description on the Title Deed while it is not indicated that the property is in imminent danger of being disposed of, it is not denied that the Fourth Respondent is anxious to recover the sums due and owing to it and that the First and Second Respondents have not

opposed the sale / disposal of the property as they were given notice that in event of default the property could be sold off.

And court further takes cognizance of the fact that the Applicant's claim is based on fraud and  
5   illegality. And it is the established principle of decided cases that ***“where a party pleads fraud /  
illegality, they ought to be given a chance to try and prove it.”***

If the injunction is not granted, the property is disposed; the Applicant would have been denied  
the right to be heard on these claims.

10   The Balance of Convenience therefore demands that the application be allowed. This court finds  
that “the comparable mischief, hardship or inconvenience which is likely to be caused to the  
Applicant by refusing the injunction will be greater than that which is likely to be caused to the  
Fourth Respondent by granting it.

15   The Applicant is in possession of the property and the balance of convenience leans heavily on  
her side.

Court is fortified in its view by the principle that ***“the court has a duty to protect the interest of  
20   the parties pending the disposal of the substantive suit. The subject matter of a temporary  
injunction is the protection of legal rights pending litigation. In exercising its jurisdiction to  
protect rights to the property from irreparable or serious damage pending the trial, the court  
does not determine the legal rights to property but merely preserves it in its actual/condition  
until legal title or ownership can be established or declared.”***

25   ***“When granting a temporary injunction, the court has to confide itself strictly to the immediate  
object sought. It is enjoined as far as possible to abstain from pre-judging the question in  
issue of the merits of the head suit.”***

30   -Refer to **Godfrey Sekitoleko and 4 Others vs. Seezi Peter Mutabazi and 2 Others, CACA  
65/2001.**



The application is hereby accordingly granted for all those reasons. The Temporary Injunction to issue retrain the Respondents, and or their agents from evicting the Applicant from the Suitland or in any way dealing with it pending the hearing and determination of the main suit.

5 The status quo should be maintained.

Costs of the application shall abide the outcome of the main suit.

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**FLAVIA SENOGA ANGLIN**

**JUDGE**

**14.01.16**

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